been expressed by the High Court of Calcutta in *Indian Oxygen Ltd.* v. *Commissioner of Income Tax* (1).

(9) In the result, questions (2) and (3) are hereby answered in favour of revenue and against the assessee. This reference is answered accordingly. There will, however, be no order as to costs.

R.N.R.

Before Hon'ble Ashok Bhan, J.

M/S GLAXO INDIA LIMITED AND ANOTHER,—*Petitioners.*

versus

M/S JALANDHAR FEED CORPORATION AND ANOTHER,—*Respondents.*

Civil Revision No. 3242 *of* 1990.

February 22, 1992.

Code of Civil Procedure (V of 1908)—*S.* 115—*Order* 39—*Rls.* 1 *and* 2—*Bank guarantee—Encashment—Injunction not to issue—Restraining defendant from encashing bank guarantee in absence of fraud or special equities—Non compliance of a term of guarantee bond gives right to defendent to invoke guarantee clause and banker is under absolute obligation to pay amount.*

Held, that one of the conditions for invoking bank guarantee was that if the cheques issued by the plaintiffs are dishonoured then the defendants would be at liberty to invoke the bank guarantee and claim the amount due under the guarantee bond. Admittedly, in this case, three cheques of the plaintiffs were dishonoured and under the terms of the bank guarantee, the defendants were entitled to invoke the same and claim the money under the guarantee bond. The Courts below have not at all adverted to this fact while coming to the conclusion that there were special equities in favour of plaintiffs for preventing the enchashment of the bank guarantee. I do not agree with the finding of the Courts below that it was either a case of fraud or special equities.

(Para 7)

Held, that since the plaintiffs acted in violation of the terms of the bank guarantee, no injunction, as prayed, could be granted in their favour.

(Para 8)

(1) (1987) 164 I.T.R. 466.

Held, that the lower appellate Court did not aver to the clause in the bank guarantee wherein it has been provided that in case the cheques issued by the plaintiffs are dishonoured then the defendants would become entitled to encash the bank guarantee. Admittedly, in this case the plaintiffs had issued three cheques, which in due course of time were dishonoured and exercising the option under the default clause, the defendants opted in its discretion and invoked the bank guarantee clause. Further on facts, I have found that no case of fraud or special equities is made out in favour of the plaintiffs entitling them to an injunction restraining the defendants from invoking the bank guarantee. The bank which gives performance guarantee must honour that guarantee according to its terms. Non compliance of any terms of the guarantee bond gives a right to the defendants to invoke the guarantee clause and the banker is under an absolute obligation to pay the amount under the guarantee bond.

(Para 12)

Held, that the rule that the High Court should not interfere with the concurrent findings of the Courts below in revisional jurisdiction would apply only where the findings have been rendered with reference to the facts and not on the basis of non-existent material and baseless assumptions.

(Para 13)

Nirmaljit Kaur, Advocate, *for the Petitioner.*

J. N. Kaushal, Sr. Advocate with Ashok Jindal, Advocate, *for the Respondent.*

JUDGMENT

Ashok Bhan, J.

(1) Plaintiff-respondents (hereinafter referred to as the plaintiffs) entered into an agreement with M/s Glaxo India Limited, the defendant-petitioners (hereinafter referred to as the defendants). Plaintiffs were appointed as Distributors for sale of the products manufactured by the defendants. Plaintiffs furnished a bank guarantee regarding the payment of cost of the goods supplied by the defendants. The said bank guarantee was operative upto 30th September, 1989. Disputes arose between the parties and ultimately the defendants terminated the distributorship of the plaintiffs. Allegations of the plaintiffs were that the defendants had supplied goods of inferior quality and, therefore, plaintiffs could not make the sale of the goods and their money was blocked in the market and the defendants ought to have co-operated with the plaintiffs for the recovery of the money due from the market but instead of doing the same, the defendants threatened to encash the bank

guarantee : that the defendants did not supply the sales tax form and, therefore, an amount of Rs. 4/5 lacs became outstanding against them and because of that, the distributorship of the plaintiffs was terminated by the defendants without affording any opportunity of hearing to the plaintiffs and that the plaintiffs have suffered huge loss as it cannot recover the sale price of the goods supplied in the market. Plaintiffs filed the present suit for permanent injunction restraining the defendants 1 and 2 from invoking the bank guarantee clause and restraining the State Bank of Patiala, Patel Chowk, Jalandhar defendant No. 3 (hereinafter referred to as the Bank) from encashing the same. Upon an application filed under order 39 rules 1 and 2 read with section 151 of the Code of Civil Procedure, an *ad interim* injunction was granted by the trial Court restraining defendants 1 and 2 from encashing the bank guarantee and restraining the bank from making the payment of the guarantee money to defendants 1 and 2, against which the appeal was dismissed by the appellate Court. Defendants 1 and 2 have come up in revision against the said order.

(2) This application was contested and in reply the stand taken by the defendants was that the plaintiff was bound by the terms incorporated in the guarantee bond. One of the terms of the guarantee bond was that if the plaintiff fails to make the payment of the sale price of the goods within 60 days of the receipt of the invoice or if the cheques issued by the plaintiffs are dishonoured then defendants 1 and 2 would have an absolute right to invoke the said bank guarantee. The bank had given a special undertaking that on a demand created by the defendants, the money under the guarantee bond shall be paid to the defendants by the bank. Further plea taken was that the claim put up by the plaintiff to the tune of Rs. 5 lacs in the suit had been raised for the first time that the defendants had furnished necessary sales tax declaration forms till 1988. The case of the plaintiff was that the goods supplied to them were not of standard quality. Further plea taken was that no injunction could be granted against the encashment of bank guarantee.

(3) The trial Court,—*vide* order dated 9th January, 1990 confirmed the order of injunction granted earlier and restrained the defendants from encashing the bank guarantee and restraining the bank from making payment of the bank guarantee to the defendants till the final disposal of the suit.

(4) In appeal, the order of the trial Court was affirmed by the lower appellate Court. Appellate Court came to the conclusion

that although generally speaking, no interim injunction can be granted restraining the encashment of the bank guarantees but in case it was found that a fraud had been committed or there existed a special equity in favour of the plaintiffs then such an interim injunction can be granted. Treating the present case to be a case of fraud and existence of special equities in favour of the plaintiffs and keeping in view the balance of convenience the order of the trial Court was affirmed. Defendants being aggrieved have come up in revision to this Court.

(5) I have heard the learned counsel for the parties at length and have gone through the record.

(6) Learned counsel appearing for the petitioners has contended that the Courts below have gravely erred in the exercise of their jurisdiction in allowing the application for interim injunction as prayed for by the plaintiffs; that the decision of the Courts below is against the law laid down by the Supreme Court of India as also by this Court. Reliance was placed on the following judgments of the Supreme Court :—

(1) *UCO Bank* v. *Bank of India and others* (1).

(2) *Centax (India) Ltd.* v. *Vinimar Impex INC, and others* (2).

(3) *General Electric Technical Services Company Inc.* v. *M/s Punj Sons (P) Ltd. and another* (3).

(4) *U.P. Co-operative Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.* (4).

In *United Commercial Bank's* case (supra), the Supreme Court held as under :—

> "A bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit. In view of the banker's obligation under an irrevocable letter of credit to pay, his buyer customer cannot instruct him not to pay. The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods

(1) 1981 S.C. 1426.
(2) 1886(4) S.C.C. 136.
(3) J.T. 1991 (3) S.C. 360.
(4) 1988 (1) S.C.C. 174.

which imposes on the banker an absolute obligation to pay. The same considerations apply to a bank guarantee. A letter of credit sometimes resembles and is analogous to a contract of guarantee. A bank which gives a performance guarantee must honour that guarantee according to its terms."

"The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

Similarly in *M/s Punj Sons'* case (supra), the Supreme Court laid down the following law :—

"The question is whether the Court was justified in restraining the Bank from paying to GESTSCO under the bank guarantee at the instance of respondent-1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in a recent judgment of this Court in *U.P. Co-operative Federation Ltd.* v. *Singh* Consultants and Engineers (P) Ltd, 1988 (1) S.C.C. 174, wherein Sabyasachi Mukarji, J. as he then was, observed at (189) 'that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operations will get jeopardised.' It was further observed that the Bank must honour the Bank

guarantee free from interference by the Courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

(7) I find substance in the submission of the learned counsel appearing for the petitioners. The judgments rendered by both the Courts below are against the law laid down by the Supreme Court. One of the conditions of the bank guarantee was that if the distributor fails to make the payment of the amount due on if the cheques presented by the said distributor are dishonoured then it would be open to the defendants to invoke the bank guarantee clause. Bank that is defendant No. 3 also gave an undertaking that in case the distributor (plaintiff) fails to make the payment of the amount due or if the cheques issued by the plaintiffs are dishonoured then it would pay the amount due, payable under the said guarantee. The plaintiffs had agreed to make the payment within 60 days of the receipt of the invoice of the goods. The guarantee was in the sum of Rs. 2 lacs. Plaintiffs issued three cheques the details of which are given below :—

Invoice No.	Cheque No.	Date	Amount
KHL 400 162/163	501986	21.1.1989	1,11,757.00
KHL 400 166/869	501971	6.2.1989	1,21,349.00
KHL 400 173/174	501972	6.2.1989	1,16.988.00

These cheques were admittedly dishonoured and thereafter on 6th June, 1989, the defendants wrote a letter to the bank invoking the bank guarantee clause and demanding the payment of the guarantee money under the guarantee bond. The present suit was filed on 18th/28th June, 1989. As indicated above, one of the conditions for invoking bank guarantee was that if the cheques issued by the plaintiffs are dishonoured then the defendants would be at liberty to invoke the bank guarantee thus and claim the amount due under the guarantee bond. Admittedly, in this case, three cheques of the plaintiffs were dishonoured and under the terms of the bank guarantee, the defendants were entitled to invoke the same and claim the money under the guarantee bond. The Courts below have not at all adverted to this fact while coming to the conclusion that there were special equities in favour of plaintiffs for preventing the encashment of the bank guarantee. I do not agree with the finding of the Courts below that it was either a case of fraud or special equities. Fraud has been defined in section 17 of the Indian Contract Act and the same reads as under :—

> "17. "Fraud" defined. "Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :
>
> (1) the suggestion, as to fact, of that which is not true by one who does not believe it to be true ;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact ;
>
> (3) a promise made without any intention of performing it ;
>
> (4) any other act fitted to deceive ;
>
> (5) any such act or omission as the law specially declare to be fraudulent."

(8) The first appellate Court recorded a finding that a fraud seems to have been committed against the plaintiffs whereas the case of the plaintiffs does not fall under any of the clauses of section 17 of the Indian Contract Act. The first appellate Court had relied upon clause (5) to come to the conclusion that the case of the plaintiff would fall under residuary clause (5) of section 17 to bring the case within the definition of 'fraud'. A party has to

prove that an act has been committed by the opposite party with intent to deceive or induce him to enter into a contract by concealing true, facts with an intention not to perform the contract. No facts have been brought on the record *prima facie* that the contract entered into between the parties was with fraudulent intention on the part of the defendants. Allegation regarding non supply of sales-tax forms was denied by the defendants. Once the plaintiffs fail to honour the commitment of making the payment within 60 days of the receipt of the invoices of the goods or when the cheques issued by them were dishonoured then the defendants were well within their rights in terms of the guarantee bond to invoke the bank guarantee clause and demand money under the guarantee bond. Thus no case of fraud is made out. The first appellate Court held that the definition of the word 'fraud' is not exhaustive and taking the facts stated by the plaintiffs to be correct regarding the outstanding dues, non-supply of sales-tax forms and cancellation of distributorship of the plaintiffs came to the conclusion that it was a case of fraud and special equities. The facts found by the Courts below are based on misreading of the documents, omission to read the documents fully, misreading and misinterpreting the judgments of the Supreme Court of India. The first appellate Court even did not refer to the clause in the bank guarantee which authorised the defendants to encash the bank guarantee if the cheques issued by them were dishonoured. As demonstrated in the earlier part of the judgment, three cheques issued by the plaintiffs were dishonoured and in the letter invoking the bank guarantee clause the defendants have specially mentioned that since the plaintiffs have failed to honour their commitment for making the payment within stipulated period and their cheques having been dishonoured, the defendants are invoking the bank guarantee and creating a demand upon the bank to make payment of the money under the guarantee bond. Since the plaintiffs acted in violation of the terms of the bank guarantee, no injunction, as prayed, could be granted in their favour specially in view of the law laid down by the Supreme Court, referred to above.

(9) Learned counsel appearing for the plaintiffs thereafter argued that in order to maintain a petition for revision, there must be an error relating to jurisdiction committed by the lower Court either by way of assumption of jurisdiction it does not have, or failure to exercise its jurisdiction which it has, or by exercising its jurisdiction illegally or with material irregularity. In the absence

of any of these three ingredients, the revision petition is not maintainable and has to be dismissed in view of the following four decisions of the apex Court :—

(1) *Keshardeo Chamria* v. *Radha Kishan Chamria and others* (1).

(2) *M/s D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh and others* (2).

(3) *The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another* v. *Ajit Prasad* (3).

(4) *Pandurang Dhondi Chougle and others* v. *Maruti Hari Jadhav and others* (4).

(5) *Ratilal Balabhai Nazar* v. *Ranchhodbhai Shankarbhai Patel and another* (5).

(10) In *Keshardeo Chamria's* case (supra), it has been held by their Lordships of the Supreme Court while approving the judgment of Nagpur High Court (in *Narayan Sonaji* v. *Sheshrao Vithoba* (6), that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. These words, more or less, were repeated by their Lordships of the Supreme Court in *M/s D.L.F. Housing and Construction Co.'s* case (supra) and it was held as under :-

"While exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally" and "with material irregularity" as used in Clause (c) do not cover either

(1) A.I.R. 1953 S.C. 23.
(2) A.I.R. 1971 S.C. 2324.
(3) A.I.R. 1973 S.C. 76.
(4) A.I.R. 1966 S.C. 153.
(5) A.I.R. 1966 S.C. 439.
(6) A.I.R. 1948 Nagpur 258.

errors of fact or law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimately decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with."

In *Ajit Prasad's* case (supra), their Lordships of the Supreme Court held as under :—

"In our opinion the High Court had no jurisdiction to interfere with the order of the first appellate Court. It is not the conclusion of the High Court that the first appellate Court had no jurisdiction to make the order that it made. The order of the first appellate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate Court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under Section 115 of the Civil Procedure Code."

(11) There is no dispute with the proposition canvassed by the learned counsel appearing for the plaintiffs that a petition for revision cannot be maintained until and unless there was an error committed by the lower Courts with regard to jurisdiction that is :—

(a) either by way of assumption of jurisdiction which it does not have ;

(b) failure to exercise jurisdiction which it has, or

(c) by exercising its jurisdiction illegally or with material irregularity.

(12) In my considered view, the Courts below have erred illegally in the exercise of jurisdiction with material irregularity. On fact, I have found that the lower appellate Court did not aver to the clause in the bank guarantee wherein it has been provided that in case the cheques issued by the plaintiffs are dishonoured

then the defendants would become entitled to encash the bank guarantee. Admittedly, in this case the plaintiffs had issued three cheques, which in due course of time were dishonoured and exercising the option under the default clause, the defendants opted in its discretion and invoked the bank guarantee clause. Further on facts, I have found that no case of fraud or special equities is made out in favour of the plaintiffs entitling them to an injunction restraining the defendants from invoking the bank guarantee. The bank which gives performance guarantee must honour that guarantee according to its terms. Non compliance of any terms of the guarantee bond gives a right to the defendants to invoke the guarantee clause and the banker is under an absolute obligation to pay the amount under the guarantee bond.

(13) I have already held that it was not a case of fraud or special equities in favour of the plaintiffs. The view taken by the Courts below is against the law laid down by their Lordships of the Supreme Court. The powers under this section are intended to be exercised with a view to subserve and not to defeat the ends of justice. Taking a very technical view would not meet the ends of justice and rather it would negate the justice. The rule that the High Court should not interfere with the concurrent finding of the Courts below in revisional jurisdiction would apply only where the findings have been rendered with reference to the facts and not on the basis of non-existent material and baseless assumptions. In this case, the Courts below have come to the conclusion regarding 'fraud' and special equities in favour of the plaintiffs on the basis of non existent material and baseless assumptions and that is why the Courts below have erred illegally and with material irregularity in the exercise of their jurisdiction.

(14) For the reasons recorded above, the revision petition is allowed with costs and the impugned orders of the Courts below are set aside, and the application under order 39 rules 1 and 2 read with section 151 C.P.C. filed by the Plaintiff is dismissed. The parties through their counsel are directed to appear before the trial Court on 26th March, 1992. However, nothing stated herein shall be construed as an expression of opinion on the merits of the case. Costs Rs. 1,000.

R.N.R.